In the Supreme Court of the United States

OCTOBER TERM, 1897.

THOMAS TINSLEY, *Plaintiff in Error*,

No. 633. *versus* } In Error to the Court of Criminal Appeals for the State of Texas.

ALBERT ERICHSON, Sheriff of Harris County, Texas.

THOMAS TINSLEY, *Appellant*,

No. 632. *versus* } On Appeal from the United States Circuit Court for the Eastern District of Texas.

ALBERT ERICHSON, Sheriff of Harris County, Texas.

Statement of the Case.

These are companion proceedings, each seeking review of an order discharging a writ of *habeas corpus* heard upon the petition of the relator, Thomas Tinsley; and, for convenience, they will be briefed together, and reference herein made (except as otherwise noted) to the printed record in the cause pending here on error, which involves the same proceedings that are brought under review in the appeal cause.

The State District Court of Harris county, Texas, upon a petition in the nature of a stockholder's and lot-holder's bill, filed by the complainants, for themselves and others similarly situated, against the Houston Cemetery Company, a corporation for purposes of sepulture, and its officers, including its president,

Thomas Tinsley, after hearing had, upon due notice and appearance by the defendants, rendered an interlocutory decree appointing William Christian its receiver for all the property of the cemetery company, and directing the company's officers to deliver over to the receiver, on his demand therefor, the company's property in their custody, including the books, notes and moneys on hand. This interlocutory decree was in accordance with approved precedent.

Loveland's Forms of Fed. Proc., page 244.

The defendants, including Tinsley, took an appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas, where the decree was in all things affirmed in an opinion by Chief Justice Garrett. Houston Cemetery Co. et al. v. Drew et al., 36 S. W. Rep., 802–805. After the rendition and affirmance of the decree, the receiver, Christian, by informing affidavit, presented to said District Court, in substance, that when the court acquired jurisdiction over the cemetery company's property, Tinsley held in his custody, as the company's officer, the corporate minute book, specified bills receivable or notes, a trust fund destined to the permanent maintenance of the cemetery amounting to four hundred and ninety-two dollars and fifty-two cents ($492.52), a further sum of money amounting to over three thousand dollars ($3,000), and also a certain bank deposit book, all the property of the company; and that Tinsley, notwithstanding a personal demand on him therefor, by informant as receiver, had refused to turn over said property, or any

of it, though having it within his power and ability so to do. (Rec., 13–16, and 29–34.)

Upon the affidavit being filed, the Honorable John G. Tod, Judge of said District Court, to wit, on February 2, 1897, entered a rule against Tinsley to show cause, and on the same day Tinsley accepted service for appearance on February 6, 1897 (Rec., 33, 34). At the appointed time, Tinsley answered the rule, setting up that he had not had the bank deposit book or the fund of over three thousand dollars ($3000); that the company's secretary, Wisby, had misappropriated the trust fund of $492.52, for which respondent had given his receipt to make good that fund, but averring later on, that he had invested said fund in lien notes at a cost of $7.70, to wit, April 26, 1896, being *after the receiver's appointment;* that the company owed him a due bill for $500, and also owed him an advance of $1000 for attorney's fees and expenses incurred *after the filing of said receivership suit;* and that, to secure such indebtedness, the company had given him a lien on said minute book and notes, to wit, April 15, 1896, but there was no averment of any indorsement of the notes so as to put the legal title in him, nor that the lien transaction occurred before the court had acquired constructive custody of the property, the formal order appointing the receiver being made only a few days afterwards, to wit, on April 23, 1896. The answer made no claim that Tinsley did not have all the notes specified in the informing affidavit, but set up that the amount of the notes was $1342, the amount of

them as claimed by the receiver being $1484.50. There was a general allegation of good faith, and also of willingness to turn over the minute book and notes, provided the receiver first paid him the amount of the debt for which he claimed to hold them as security. (Rec., 34–37.)

The receiver, in his reply, traversed the facts set up by the respondent, and, for special replication, averred that the court "had acquired jurisdiction of the entire property of said Houston Cemetery Company before the pretended deposit of the notes and book as collateral, as set forth in said answer." * * (Rec., 37.)

Upon the issues thus tendered and joined the matter was heard by the court on "evidence adduced, both oral and written," wheupon the court did "find and declare that the facts set forth in said affidavit, and the special plea of said replication are true as concerns the minute book, notes, and trust fund of four hundred ninety-two dollars and fifty-two cents, * * and that said respondent, under the evidence adduced, has failed to show cause as required, by the answer aforesaid, good or sufficient in law;" and thereupon the court did adjudge that said Tinsley was guilty of willful contempt in refusing, after due personal demand, to turn over said items of property to the receiver, though having it within his ability and power to comply, and that he—

> "pay to the sheriff of Harris county, Texas, a
> "fine of one hundred dollars, as a punishment
> "for the contempt aforesaid, and that he forth-
> "with turn over and deliver to said William

" Christian, as receiver aforesaid, the said notes " (particularly described in said schedule), min- " ute book, and trust fund of four hundred nine- " ty-two dollars and fifty-two cents, as an aid to " the enforcement to the aforesaid order of April " 23rd, 1896, and that in default of immediate " payment of said fine, and of the delivery and " turning over forthwith to said William Chris- " tian, as receiver aforesaid, of said notes, min- " ute book, and trust fund of four hundred ninety- " two dollars and fifty-two cents, he, the said con- " temnor, Thomas Tinsley, be imprisoned in the " common jail of Harris county, Texas, until he " shall pay the said fine of one hundred dollars, " as herein directed, and until he shall turn over " and deliver to the said William Christian, as " aforesaid—the said sheriff affording him, said " Thomas Tinsley, a reasonable opportunity to " do so, if he shall so desire,—the said notes, " minute book, and trust fund of four hundred " ninety-two dollars and fifty-two cents, and un- " til he shall pay to the sheriff aforesaid his cost " for executing the commitment hereunder, or " until he shall be discharged by the further or- " der of this court." * * * (Rec., 11, 26.)

A warrant of commitment, to carry into execution the judgment of conviction, was duly issued, and under that warrant Tinsley is held in custody, he having never complied, in whole or in part, nor offered to do so, nor sought from the committing court any modification of the terms of the order. (Rec., 6, 21, 22, 28, 29.)

A petition for writ of *habeas corpus*, by Tinsley, was granted by Presiding Judge Hurt of the Court of Criminal Appeals of the State of Texas. This petition set up the proceedings resulting in the relator's

conviction for contempt; and, in addition, averred that he had never had possession of a specified part of the notes, and that he held a lien on the rest of them, as also on the minute book, which was acquired before the appointment of the receiver; that, if liable for the trust fund, he owed the same only as a debt; that the presiding District Judge, who entered the order of conviction, was related within the prohibited degrees to certain cemetery lot-holders, who were not parties to the receivership cause; and that

> " his claim to all the matters and things above set
> " out was and is made in good faith, and that he
> " has the right and does assert the right thereto
> " until deprived thereof by due course of law, and
> " he says that the proceedings on said motion and
> " said judgment are not due process of law, and
> " that he ought not and can not be by such pro-
> " ceedings imprisoned or compelled to turn over
> " said property and things, for that thereby he is
> " deprived of a trial by due course of law, and
> " that said judgment and commitment are there-
> " fore void, and his detention thereunder illegal."

The petition then avers that the judgment of conviction was void, and particularizes the four grounds upon which the claim of nullity rests, stating them to be (1) because the District Judge, under the State statute, was disqualified by his relationship to the alleged lot-holders; (2) because the judgment of conviction is uncertain and indefinite and does not limit or fix the time for confinement, and especially so, because relator can never comply as to the notes not in his possession; (3) because the period of confinement was not limited, under the State statute, to three days;

and (4) because the matters set up in the informing affdavit and judgment of conviction did not and could not constitute a contempt. (Rec., 2–5, 17, 18.)

The said Court of Criminal Appeals, after due hearing, sustained exceptions to the petition and exhibits, and discharged the writ, remanding the prisoner to custody. The opinion of the court, reviewing the subject at great length, is shown by the record. (Rec., 63–73.) Two motions for rehearing were filed, but neither of them specially set up or claimed any Federal right. (Rec., 54, 73.) The arguments for petitioner as well as respondent, on the hearing before the Court of Criminal Appeals, will be found in the record. (Rec., 38, 46, 50, 54, 59.)

The assignments, of error made in this court claim, in addition to the grounds presented in the State court, that the contempt proceedings operated to deprive relator of his liberty, or (if he obeyed), of his property, in denial of due process of law and the equal protection of the law, contrary to the fifth and fourteenth amendments to the Constitution of the United States, and in violation of the treaty between the United States and Great Britain, the relator claiming to be a British subject. (Rec., 75–77.)

THE BRIEF OF THE ARGUMENT.

I.

In respect to the cause on error to the highest court of the State, this court appears to be without any jurisdictional right of review, since no Federal right was specially set up or claimed in the State court, the general averment of want of due process of law amounting to nothing.

It is not an open question in this court that, in a petition for *habeas corpus*, the general averment that the proceedings of conviction deprived the petitioner of due process of law must be regarded as the mere statement of a conclusion by the pleader, and is of no avail.

Kohl v. Lehlbeck, 160 U. S., 293.

Whitten v. Tomlinson, 160 U. S., 231.

Equally well settled is it that, in error to a judgment of the highest court of the State, the Federal right, claimed to have been infringed, must have been specially set up and claimed at a proper time, and in a proper way, in the State court, so as to make it beyond doubt that such right was there denied, and not a mere matter of argumentative inference.

Oxley Stave Company v. Butler County, 166 U. S., 648.

Leeper v. State of Texas, 139 U. S., 462, 468.

The argument of the relator, filed in the State court in support of his petition (Rec., 47, 48), shows be-

yond question that he was relying upon provisions of the Constitution of the State, in his general claim of the proceedings not being according to *due course of law* or due process of law. This is made certain, because, in the argument, the only constitutional claim made was that relator "is entitled under the Constitution to a trial by jury on these issues in the usual method of civil trials, and that he could not be deprived of said property except by due process of law," and that the "Constitution also provides that no citizen in this State shall be deprived of his property except by due process of law. Due process of law is the method and means laid down by the statutes of our State for trial in the courts of the State by a suit regularly instituted, citation, and trial. It is not due process of law to deprive a citizen of his property by contempt proceedings." The relator could not have had in mind the Constitution of the United States, because it is settled that at least the first ten amendments of that instrument, including the seventh, relating to jury trials, operate exclusively upon Federal power.

Eilenbecker v. The District Court of Plymouth Co., 134 U. S., 31.

McElvaine v. Brush, 142 U. S., 155.

Walker v. Sauvinet, 92 U. S., (2 Otto) 90.

II.

In respect to the appeal cause, without regard to the general averments of Federal right as being tantamount to only the pleader's conclusions of law, the Circuit Court properly exercised its discretion in refusing to interfere with the State court's process, and in leaving the relator to his remedy in the State courts, and thence on error to this court.

The authorities in support of the point appear so clear and conclusive that superadded argument would seem to savor of supererrogation.

Ex parte Royall, 117 U. S., 241.

In re Frederich, 149 U. S., 70.

Cook v. Hart, 146 U. S., 183.

Wood v. Brush, 140 U. S., 278.

Whitten v. Tomlinson, 160 U. S., 231.

Pepke v. Cronan, 155 U. S., 100, and cases cited.

In fact, no causes were made apparent by the petition which would authorize a Federal Court to discharge a prisoner in jail on State process.

United States Rev. Stats., Sec. 753.

2 Foster's Fed. Pr., 2nd ed., p. 719.

The general averment in the petition of detention in violation of the Constitution, laws and treaties of the United States, could not be considered, as we have seen.

Ex parte Cuddy, 131 U. S., 280, and cases cited *supra*.

III.

Due process of law is referable to the subject-matter and nature of the particular inquiry; and since the committing court, being one of general jurisdiction, had unquestionable power to render the disobeyed decree, as well as jurisdiction of the person and subject-matter involved in the contempt inquiry, and since it proceeded with such inquiry in the usual course of law applicable to contempt proceedings, in which no jury trial is or ever has been a requisite of the general law of the land, and since it condemned only after full hearing upon proper notice, the claim of denial of due process of law appears utterly untenable.

The committing court, in the instant case, was beyond doubt possessed of ample jurisdiction in the premises, for, being created by the Constitution of the State, it is invested by that instrument with original jurisdiction—

> " of all suits, complaints or pleas whatever, with-
> " out regard to any distinction between law and
> " equity, when the matter in controversy shall be
> " valued at or amount to five hundred dollars,
> " exclusive of interest." Texas Const., Art. 5, Sec. 8, carried into Art. 1098, of Rev. Stats. of Texas (1895).

It is elementary that if the committing court had, and did not exceed, rightful jurisdiction in what it did, the prisoner cannot be discharged on collateral attack by *habeas corpus*, for in such event the judgment is not void, however erroneous or irregular it might be deemed.

Davis v. Beason, Sheriff of Oneida Co., 133 U. S., 333.

Lennon v. Lake Shore, etc., Railway Co., 22 U. S. App., 561, 565, and numerous cases cited from this court.

Church on Habeas Corpus, 2nd ed., Sec. 315.

The procedure adopted, in the contempt matter, was in accordance with strictest technical requirement.

Ex-parte Kirby (Tex. Crim. Ct. App.), 34 S. W. Rep., 635, 962.

Repalje on Contempts, Secs. 93, 94, 95, 103, 104, 111, 120, 125 and 126.

It is deemed too well settled in this court, as well as by the concensus of judicial opinion elsewhere, to admit of argument, that a jury trial is not necessary to due process of law in a contempt inquiry.

Eilenbecker v. Plymouth Co. District Court, 134 U. S., 31.

Walker v. Sauvinet, 92 U. S. (2 Otto), 90.

Rapalje on Contempts, Sec. 112.

Besides, a jury trial is allowable in Texas in no civil matter to which applicable, unless upon compliance with certain prerequisites not shown to have been observed in the instant case.

Revised Statutes of Texas (1895), Art. 3188, providing—

> " No jury trial shall be had in any civil suit un-
> " less an application therefor be made in open
> " court and a jury fee be deposited, or an affi-
> " davit be made of inability to make such de-
> " posit, as hereinafter prescribed."

IV.

The claim of denial of equal protection of the law is without merit, inasmuch as it does not appear that, by any law or course of procedure in Texas, any other person ever had been or ever would be dealt with differently, in similar circumstances and conditions.

The point is believed to be self-evident; but, for completeness of the brief, we cite a few cases declarative of the principle.

Walston v. Nevin, 128 U. S., 578.

Missouri Pacific Railroad Co. v. Mackey, 127 U. S., 209.

V.

The relator's suggestion that he is a British subject presents no new phase of the questions at issue, because it can not be claimed that the treaty with Great Britain made him any less amenable to judicial process for contempt than would be a citizen of this country.

VI.

The claim by relator that his refractory conduct finds justification in the asserted lien on the notes and minute book, is barren of merit, (1) because, within the scope of the contempt inquiry, the fact was adjudicated against him by the committing court; (2) because nothing is shown to impugn the committing court's finding that the incipiency of the lien (if such existed) was after the court acquired

jurisdiction of the fund; and (3) because the contempt conviction operated no adjudication that in any manner militated against the assertion and enforcement of his lien (if he had one) by intervening petition in the receivership cause.

Reference being had to the issues tendered and joined in the contempt matter, it is apparent that the committing court, in point of fact, found against Tinsley's contention, so far as concerned the court's right to the custody of the property through its receiver; and it is certainly not an open question, that matters of fact adjudicated by the committing court can not be tried anew on *habeas corpus*.

Lennon v. Lake Shore, etc., R'y Co., 22 U. S. App., 565, and cases cited.

Davis v. Beason, Sheriff of Oneida Co., 133 U. S., 333.

Church on Habeas Corpus, 2nd ed., Sec. 315.

Again, the informant's replication to Tinsley's answer on the contempt hearing tendered the distinct issue, that the lien transaction occurred after the court had acquired jurisdiction of the property. The committing court found this fact to be true, and that would appear to be an end of the matter, as shown by the authorities cited, *supra*. It is true the relator claimed that the transaction took place before the formal appointment of the receiver, but the inquiry resulting in that appointment had been instituted some time before the appointment was made, and it is thus a fair deduction that the committing court's jurisdiction

over the property considerably ante-dated the formal appointment and qualification of the receiver, in which event it is the settled doctrine in Texas, as well as in the Federal Circuit comprising such territory, that the court's custody would relate back to the incipient step resulting in the appointment, and be unaffected by intermediate liens not acquired by innocent persons without notice.

Riesner v. Gulf, Colorado and Santa Fe Railway Company, 89 Texas, 656, 658 *et seq.*, and cases cited and reviewed.

Independent of the considerations thus far advanced, the sole inquiry on the contempt hearing, in this connection, involved merely the court's right to the custody through its receiver, and not the question whether Tinsley could, by intervening petition in the receivership cause, or by other civil remedy, establish and enforce a lien on the property. There is no claim by the relator that the notes were indorsed to him, so as to put in him the legal title by the law merchant, even if this could affect the question. Hence, to deliver over the property to the receiver could and would impair no pecuniary right claimed by the relator; and it is the settled doctrine in Texas that, where a receiver is appointed, pre-existing liens must be enforced through the receivership.

Ellis v. Vernon Ice, Light and Water Company, 86 Texas, 109.

The insincerity of relator's contention that, if he gave up the custody of the property, he would lose

the lien claim by him, is placed beyond question by the opinion of the Court of Criminal Appeals where the lien matter is thus disposed of:

> " It will be observed, as before stated, that the " relator did not claim the legal title in the notes " or in the minute book, but merely an equity or a " lien thereon to secure his debt. It seems that " he, as an officer of the company, had transferred " to himself as an individual, through the direc- " tion of some of the stockholders, the notes and " minute book in question. The action of the " court in ordering him turn over said property to " the receiver was by no means an adjudication " as to his lien. This, if it was a genuine lien, " would be preserved to him in the hands of the " receiver. The effect of the order was merely " to place these articles, together with all the " property of the corporation, in the hands of the " receiver for administration under the orders of " the court. In our opinion, the court unques- " tionably had the power to do this, and did not " exceed its jurisdiction in making said order." (Rec., 71.)

VII.

The claim of the trust fund not being on hand in kind when the court acquired jurisdiction thereof, is not only destroyed by the committing court's finding of fact to the contrary, but is belied by the relator's admission, in his answer, of having invested such fund in lien notes three days after the receiver's formal appointment.

The distinction between money owing as a debt and money on hand in kind is of a radical difference that can not escape attention. Under the Texas Constitu-

tion forbidding imprisonment for debt, had the committing court found that the trust fund was not on hand when it acquired jurisdiction, it would have remitted the parties to a civil action, as it did in respect to the item of over three thousand dollars. But the idea that money, as property on hand, can not be lawfully ordered by a court into its receiver's custody, and the order enforced by contempt procedure, is a proposition that overleaps and refutes itself. It is enough, however, to call attention to the holding of the Court of Criminal Appeals on this point, which is in these words:

> "As to the fund, if it be not a trust fund, in "possession of relator, but a mere debt, it may "be that it would not be contempt for the court "to have made the order requiring this fund to "be turned over to the receiver. However, that "question was submitted to the court. The rec-"ord shows that proof was heard upon this ques-"tion, and the court below decided that this was "a trust fund in the hands of the relator. If it "be conceded, however, that it was a debt, due "by the relator to the corporation, still, the rela-"tor was in contempt of court as to the remainder "of the property, that is, the balance of the "notes and the minute book, and the order was "unquestionably valid as to these, and the relator "not having responded to the order of the court "as to these matters, we do not feel inclined to "grant him any relief. It would be his duty to "show before this court, in order to obtain relief "by the writ of *habeas corpus*, that he had done "all within his power to comply with that por-"tion of the order of the court which it unques-"tionably had a right to make." (Rec., 71, 72.)

VIII.

The claim by relator that he cannot comply as to part of the notes (if true) is conclusively met by his contumacious refusal to comply with the order, as far as he admits his ability to do so, the rule being well settled that until the relator does this, and then seeks in the committing court modification of the order in other respects, he cannot be relieved on *habeas corpus*.

It is not probably true that Tinsley is without possession of the portion of the notes which he claims not to have had; for, in his answer to the rule to show cause, he makes no point of this sort, merely claiming that the aggregate amount of the notes is not so large as claimed by the receiver, and if those which he now disclaims be deducted from the aggregate, the amount will be reduced way below the figures which his answer showed to represent the notes held by him. (Rec., 36, compare with p. 4.)

Aside from this, however, the proposition we make is believed to be not open to debate, and conclusive against the relator's contention.

Ex-parte Thomas Tinsley, Court of Crim. App., Rec., 71–72.

In re Swan, Petitioner, 150 U. S., 637, 653, the court saying that

> " he can not be discharged on *habeas corpus* un-
> " til he has performed so much of the judgment or
> " served out so much of the sentence as it was
> " within the power of the court to impose. *Ex-*
> " *parte* Lange, 85 U. S. (18 Wall.), 163; *Ex-*
> " *parte* Parks, 93 U. S., 18."

IX.

Since the imprisonment of the relator absolutely ends as soon as he pays the fine and delivers over the property, the claim that the order of conviction was for an uncertain and indefinite term of imprisonment is without any merit.

If the order stood alone upon the direction that the relator be imprisoned "until the further order of the court," we would have a different case. But here the imprisonment ends so soon as the refractory contemnor consents to yield obedience, or, should he not comply, until the further order of the court. The last clause simply guards against embarrassment from lapse of the term or future disability to comply, leaving it in the court's power to discharge him any way should it choose to do so, but not impairing the *ipso facto* discharge arising from obedience. The entire propriety and lawfulness of this order are clear in principle, as well as upon authority.

Church on Habeas Corpus, 2nd ed., Secs. 337, 338, and cases cited.

Repalje on Contempts, Secs. 139 and 130, and cases cited.

X.

The other questions presented appear irrelevant here, as they merely compass supposed rights resting upon provisions of the statutory and organic law of the State, which provisions have been construed by the highest State court adversely to the relator's contention.

It is said the order for delivery of the trust fund item operated imprisonment for debt, in violation of the Texas Constitution, Art. 1, Sec. 18. But the money on hand, as property, was not a debt, and hence the point was denied by the Court of Criminal Appeals, as shown *supra*.

Insistence is made that the imprisonment for contempt was limited, by the State statute (Art. 1101 of Texas Rev. Stats.), to three days. But the highest State court, construing the statute, has held, with the current of authority elsewhere, that the statute has reference to *quasi*-criminal contempt, as a punishment, and not to a civil contempt, where the very authority of the court would be paralyzed if shorn of power to imprison until obedience.

Ex parte Thomas Tinsley, Court of Crim. App. Rec., 72.

Rapalje's Contempts, Secs. 1, 3, 11, 16, 21, and cases cited.

The contention for nullity of the convicting order because of the judge's alleged relationship to persons who had never become parties to the receivership cause, does not appear to have been carried into the assignments in this court. But, if the point be still urged, it is utterly untenable, since the highest courts of the State have construed the statute on the subject adversely to relator's contention.

Ex-parte Thomas Tinsley, Court of Crim. App., Rec., 68.

Houston Cemetery Company v. Drew (Tex. Civ.

App.), 36 S. W. Rep., 802, application for error to State Supreme Court not allowed.

It is to be observed, and it is beyond doubt, that Tinsley need never have gone to jail, and that every moment of his imprisonment has been and is self-inflicted. Whatever may be the avowed or hidden motive of his unfathomable conduct, whether a fear of incriminating evidence in the minute book, or a contemptuous determination to humiliate the committing court, or a sordid hope for indemnity damage as a British subject if declared to have been imprisoned without jurisdiction, or whether his motive be all or none of these, better far, we submit, that he should spend his mortal days behind the bars than be permitted to inflict a mortal wound upon the judicial tribunals of this land.

Repectfully submitted,

PRESLEY K. EWING,
HENRY F. RING,

Attorneys of Record and of Counsel for Defendant in Error and Appellee, Sheriff of Harris County.